U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JAN 2 8 2013 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a civil engineering firm. It sought to employ the beneficiary permanently in the United States as a design engineer supervisor, pursuant to section 203(b)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(2).[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly. The petitioner filed a timely appeal.

On appeal, counsel asserts that the petitioner has the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel states that the petitioner is a wholly-owned subsidiary of , which possesses a cash balance in excess of 1.4 billion dollars and net current assets of 1.1 billion dollars. Counsel contends that the petitioner has an average monthly cash balance on hand in the amount of $578,239.00 with current accounts receivable in the amount of $951,860.00. Counsel submits documentation in support of the appeal.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In the instant case, the ETA Form 9089 was accepted on September 7, 2010. The proffered wage as stated on the ETA Form 9089 is $76,024.00 annually. The ETA From 9089 states that the position requires a U.S. master's degree in civil engineering, no training, and no experience in the offered job. At part K of the ETA Form 9089, which was signed by the beneficiary on August 1, 2011, the beneficiary claimed to be presently employed by the petitioner in the offered job of design engineer supervisor since January 1, 2009.

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[1] Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(2).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA From 9089 establishes a priority date for any immigrant petition later based on the ETA From 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2).

The AAO issued a Request for Evidence (RFE) to counsel and the petitioner on October 25, 2012, acknowledging that the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return, for 2010 in support of the claim that it possessed the continuing ability to pay the proffered wage from the priority date of September 7, 2010. The AAO also noted that although the beneficiary claimed to be presently employed by the petitioner in the offered job of design engineer supervisor since January 1, 2009 at part K of the ETA Form 9089, the record is absent any evidence such as Forms W-2, Wage and Tax Statement, or Forms 1099-MISC, Miscellaneous Income, reflecting wages paid by the petitioner to the beneficiary in 2009, 2010, and 2011. To supplement the record the AAO requested that the petitioner submit its complete federal income tax return or audited financial statement for 2011, as well as any Form W-2 statements or Forms 1099-MISC statements issued by the petitioner to the beneficiary in 2009, 2010, and 2011.

The petitioner and counsel were given 45 days to respond to the RFE The AAO specifically alerted the petitioner and counsel that failure to respond to the RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

More than 45 days have passed since the RFE was issued, and the AAO has received no response from either the petitioner or counsel. Therefore, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.